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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FMC CORPORATION
Petitioner,

v.

CYNTHIA ANN HOLLIDAY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF SELF-INSURANCE INSTITUTE OF AMERICA, INC. (SIIA) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Self-Insurance Institute of America, Inc. (SIIA) hereby submits this brief in support of the petition filed in No. 89-1048 for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 11, 1989.

SIIA has obtained the written consent of both FMC Corporation and Cynthia Ann Holliday to the filing of a brief *amicus curiae* in support of the petition for certiorari.[1]

INTEREST OF THE AMICUS

SIIA is a non-profit corporation composed of over 700 members dedicated to the advancement and protection of the self-insurance industry. SIIA's membership includes users of self-insurance such as employer plan sponsors, as well as service providers such as third-party administrators, reinsurance companies, and other entities engaged in the self-insurance business. SIIA is the only association in the U.S. which represents firms, professionals, and organizations which participate in the broad spectrum of self-insurance, including self-insured group health plans.

Through SIIA, its members coordinate their views and provide practical information and recommendations to government and the public on how the self-insurance system functions, and on the impact of goverment regulations and interpretations under the Employee Retirement Income Security Act of 1974 (ERISA) concerning self-insured health plans and plan participants. This includes rendering assistance to courts in their deliberations on significant self-insured health plan issues of broad concern to members.

SIIA has an interest in the ERISA preemption issue presented by the petition for three reasons. First, member companies which sponsor self-insured benefit plans face a significant potential monetary loss under

[1] Original consent letters from both FMC Corporation and Cynthia Ann Holliday have been lodged with the Court.

the Pennsylvania Motor Vehicle Financial Responsibility Law of 1984 (75 Pa. Cons. Stat. Ann. § 1720 (Purdon 1984)) or similar statutes in other states because, since the passage of ERISA in 1974, such plans have contained subrogation clauses allowing recovery of medical expenses paid by such plans for injuries sustained through the negligence of third parties. Second, because many SIIA employer members operate on a multistate basis, they are legitimately concerned that any erosion of ERISA's preemption provisions will subject self-insured health plans to burdensome and costly state regulation which will severely hamper their efforts to maintain uniform and equitable benefits for covered employees. Third, the Third Circuit's decision[2] creates significant administrative problems for thousands of contract administrators who provide services to self-insured health plans.

Accordingly, SIIA files this *amicus curiae* brief in support of the petition for certiorari.

REASONS FOR GRANTING THE WRIT

The importance of the Third Circuit's decision in this case and the need for prompt review by this Court cannot be overstated.[3] As the petition makes clear, that decision created a square conflict with other circuits which have followed this Court's holding in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), that Section 514 of ERISA preempts state regulation of self-insured

[2] *FMC Corp. v. Holliday*, 885 F.2d 79, *reh'g denied*, —— F.2d —— (3d Cir. 1989).

[3] The principal issue in this case is whether through its "deemer clause" ERISA preempts application to self-funded

health plans.[4] More specifically, the Third Circuit's decision, as well as a decision by the Sixth Circuit in *Northern Group Services v. Auto Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1754 (1988), that ERISA does not preempt a state anti-subrogation insurance statute as applied to self-insured plans, are in direct conflict with the Ninth Circuit's decision in *United Food & Commercial Workers v. Pacyga*, *supra*, 801 F.2d 1157 (9th Cir. 1986).

This conflict has created widespread uncertainty on an important question of federal law directly affecting thousands of self-funded health plans, administrators who provide services to such plans, and millions of plan beneficiaries. It has also heightened the potential of increased litigation involving and affecting self-insured health plans, a threat which may

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health plans of the anti-subrogation provision in Pennsylvania's Motor Vehicle Financial Responsibility Law of 1984. The Third Circuit held that ERISA's express preemption provisions did not preclude application of the Pennsylavnia statute to self-funded health plans.

[4] *See Baxter v. Lynn*, 886 F.2d 182, *reh'g denied*, —— F.2d —— (8th Cir. 1989); *Reilly v. Blue Cross and Blue Shield of Wisconsin*, 846 F.2d 416 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 145 (1988); *United Food & Commercial Workers v. Pacyga*, 801 F.2d 1157 (9th Cir. 1986); *Powell v. Chesapeake & Potomac Tele. Co.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Children's Hosp. v. Whitcomb*, 778 F.2d 239 (5th Cir. 1985). In *Insurance Board of Bethlehem Steel Corp. v. Muir*, 819 F.2d 408 (3d Cir. 1987), the Third Circuit itself has also held that ERISA preempts state insurance law as applied to self-insured health plans.

undermine the continued growth of such plans as an alternative to purchased insurance for delivering health benefits to employees.

A. THE THIRD CIRCUIT FAILED TO RECOGNIZE THE DISTINCTION BETWEEN INSURANCE AND SELF-INSURANCE AND HAS THEREBY CREATED CONFUSION ON AN IMPORTANT QUESTION OF LAW.

In holding that a state insurance law applies to a self-insured health plan, the Third Circuit ignored ERISA's express statutory language and this Court's holding in *Metropolitan Life*, *supra*, that such benefit plans are exempted from state regulation. As this Court was at pains to point out in *Metropolitan Life*, "uninsured" employee benefits are not open to even "indirect regulation" under state law. 471 U.S. at 746-47.

The Third Circuit not only overlooked the long-standing distinction between insurance and self-insurance recognized in *Metropolitan Life*, but also misinterpreted ERISA's legislative history relating to preemption.[5] Thus, the Third Circuit's decision has

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[5] ERISA's legislative history confirms that, subject to certain narrow exceptions set forth in the statute, Congress intended to preempt all state law relating to employee welfare benefit plans. As explained by Rep. Dent, former Chairman of the Subcommittee on Labor of the House Labor and Education Committee:

> I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by

created confusion among firms who sponsor and administer self-funded health plans and who have acted in reliance on ERISA's broad preemption provisions, and this Court's previous interpretations.[6] In addition, the Third Circuit decision has created widespread uncertainty over the extent to which state insurance laws and regulations apply to self-funded health plans that operate currently within a federal regulatory framework which allows such plans the flexibility to incorporate a variety of plan design features, including subrogation clauses, within the plans.

There can be no serious dispute about the historical distinction between insurance and self-insurance upon which employers who self-insure have always relied.[7] It is a longstanding practice that self-insured

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eliminating the threat of conflicting and inconsistent State and local regulation.

120 Cong. Rec. 29197 (1974). The legislative history clearly demonstrates that Congress, in enacting ERISA, intended to replace the conflicting system of state and local regulation of employee benefit plans with a "uniform source of law" for evaluating the conduct of plan administrators. Introductory Statement of Sen. Javits on S. 1557, *reprinted in 1 Legislative History of ERISA of 1974* at 273, 279 (1973); *accord* 120 Cong. Rec. 29933 (1974) (statement of Sen. Williams); *id.* at 29197 (statement of Rep. Dent).

[6] *E.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

[7] The concept of self-insurance can be traced back to the middle ages when the sea-faring Phoenicians assumed the total risk of loss of destruction of their maritime fleets on voyages around the world. Indeed, as far back as the thirteenth century, merchant guides provided members with "insurance" protection against fire, shipwreck, flood, disability

risks, including the medical expenses of employees, can be financed by employers from their own current revenues. Even prior to ERISA, state courts understood that an employer who self-insures health benefits is not in the "insurance business." *Farmer v. Monsanto Co.*, 517 S.W.2d (Mo. 1974). ERISA codified and expanded this well established distinction in 1974 when it adopted a broad Section 514 preemption provision, including a "deemer" clause which expressly removed *uninsured* benefit plans from the scope of the ERISA insurance savings clause.

In concluding that ERISA's "deemer" provision does not insulate self-funded health plans from state regulation, the Third Circuit fashioned a new judicial standard. Thus, under the Third Circuit's approach, for the first time the "deemer" clause was held not applicable to self-funded health plans in cases where a state anti-subrogation law "affects a central concern of ERISA." *FMC Corp. v. Holliday, supra*, 885 F.2d at 89. The Third Circuit surprisingly concluded that, notwithstanding the Pennsylvania Motor Vehicle Law's direct interference with a basic plan design feature integral to a health plan, namely a subrogation clause, the Pennsylvania statute did not affect any "core" ERISA concerns. This novel and illogical interpretation involving application of a judicially contrived standard to ERISA's "deemer" clause raises a significant question of law to be addressed by this Court.

The dilemma now facing those who self-insure health benefits simply stated is: "Do we rely on the

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and other misfortunes while those not protected by the guild assumed the risk of their own losses. W. Durant, *Story of Civilization*, Vol. IV (1950).

express ERISA preemption language which states that no "employee benefit plan . . . shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . ., 29 U.S.C. § 1144(b)(2)(B), or do we expend the time and money necessary to amend our self-insured health plans to comply with a multiplicity of state insurance laws?" Or, more troublesome, employers who self-insure ask: "Do we heed the Third Circuit in *FMC Corp.* and terminate our self-insured health plans (or fail to start new ones) or should we instead convert to a more costly insured health plan?"

In sum, this confusion and uncertainty over possible state regulation creates substantial problems for companies, like those represented by SIIA, that maintain self-funded health plans. It is this confusion that we ask this Court to now resolve by granting the requested writ.

B. THE CONFLICT IN THE COURTS ADVERSELY AFFECTS THE ADMINISTRATION OF SELF-FUNDED PLANS.

The conflict in the courts is having a significant adverse impact on the administration of thousands of self-funded plans, particularly those which are maintained in more than one state. Large and medium-sized employers which maintain self-funded plans typically operate on a national or multi-state basis.[8] Such plans, often administered by third-party administrators, need certainty that their programs will be

[8] Forty-three percent of medium-sized employers (250 to 999 employees) and eighty percent of large employers (5,000 to 50,000 or more employees) sponsor self-insured health plans. U.S. Department of Health and Human Services, *Health Care Financing Review*, Vol. 8, No. 8 (1986).

governed by a single set of laws, rather than varying rules decreed by courts in fifty different jurisdictions.[9]

The phenomenal growth in self-funded plans has been influenced to a great extent by the current system of uniform benefit plan administration fostered by ERISA. To subject such plans to the threat of often conflicting and inconsistent state insurance regulation—to say nothing of the threat of costly state judicial proceedings—will almost certainly result in piecemeal state regulation of such plans; rather than uniformity, chaos will prevail.

C. THE THIRD CIRCUIT'S DECISION ADDS TO ESCALATING HEALTH COSTS AND THREATENS THE CONTINUED VIABILITY OF SELF-FUNDING AS AN ALTERNATIVE TO INSURED HEALTH PLANS.

The *Metropolitan Life* case, provided a significant impetus to companies to self-insure employee health benefits. This growth reflects recognition of self-insurance not only as an alternative to insurance for funding health benefits, but also as a cost efficient method of responding to rapidly escalating health costs.

Important cost factors which have contributed to the growth of self-insurance within the present

[9] Self-funded plans provide health benefits to more than fifty percent of the workforce. Fifty-one percent of firms which maintain self-insured health plans utilize an outside third-party contract administrator to administer self-insured plans. During the five year period 1981-1985, enrollment in self-insured health plans of medium and large firms nearly doubled. Bureau of Labor Statistics, U.S. Labor Dept., *Annual Employee Benefit Survey* (1981-85).

ERISA regulatory framework include flexibility of plan design, greater control over claims, freedom from state insurance premium taxes and mandated benefits laws,[10] and cash flow advantages. Each of these factors results in a reduction of health benefit costs.

Typically self-funded plans contain coordination of benefit or subrogation provisions. Subrogation provisions generally involve plan recoveries for medical expenses paid by the plan for injuries sustained in automobile accidents, for product defects, accidents on private or public property and malpractice by hospitals and doctors, which are also paid to plan participants pursuant to legal action or settlement in civil cases. Subrogation recoveries do not reduce medical expenses which would otherwise be paid to plan participants in the absence of a third party recovery. By eliminating duplicative payments, self-funded health plans with subrogation clauses have contributed to a reduction of overall health costs for such plans. Accordingly, the ability to subrogate in such cases contributes to more cost-efficient administration of health plans and lower health benefit payments. Thus, the Third Circuit's decision below will add to escalating health costs and threatens the continued use of self-insured health benefit programs as a viable method of controlling health costs.

In sum, the threat of state interference in the administration of self-funded health plans with its attendant higher costs will continue until this Court settles the issue now before it.

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[10] Self-insured plans are not subject to state premium taxes. *Birdsong v. Olson*, 708 F. Supp. 792 (W.D. Tex. 1989).

CONCLUSION

For the reasons set forth above, we urge the Court to grant the writ of certiorari so that these important and practical issues can be resolved.

Respectfully submitted,

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